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IN THE

Supreme Court of the United States

October Term, 1966

No. [redacted]131

TINA DEAL, a minor, by Frank L. Deal, her father and next friend, *et al.*,
Petitioners,

v.

CINCINNATI BOARD OF EDUCATION, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Preliminary Statement 3

Statement 5

Reasons for Allowance of the Writ 10

Conclusion 24

Appendix:

Opinion of the United States Court of Appeals for the Sixth Circuit, December 6, 1966 ..... 1a

Table of Cases

Bell v. School City of Gary, 213 F. Supp. 819 (N.D. Ind. 1963), aff'd 324 F.2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924 16

Board of Education v. Dowell, — F.2d — (10th Cir. decided January 23, 1967) 12, 16, 20, 21

Brady v. Maryland, 373 U.S. 83 4

Brown v. Board of Education, 347 U.S. 483 ..11, 12, 13, 17

Daniel v. Family Security Life Insurance Co., 336 U.S. 220 14

Douglas v. California, 372 U.S. 353 .....13, 14, 15

Downs v. Board of Education, 336 F.2d 988 (10th Cir. 1964), cert. denied 380 U.S. 914 .....12, 16, 20

PAGE

Dowell v. School Board of Oklahoma City Public Schools, 244 F. Supp. 971 (W.D. Okla. 1965) 18

Gillespie v. United States Steel Corp., 379 U.S. 148 4
Griffin v. Illinois, 351 U.S. 12 ..... 13, 14, 15

Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251 5
Holland v. Board of Public Instruction, 258 F.2d 730 (5th Cir. 1958) 18

Land v. Dollar, 330 U.S. 731 4
Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 4

McLaurin v. State Regents, 339 U.S. 637 11
Missouri ex rel. Gaines v. Canada, 305 U.S. 337 11

Perkins v. Trustees of Monroe Avenue Church of Christ, 79 Ohio App. 457, 70 N.E. 2d 487, app. dismissed 147 O.S. 537, 72 N.E. 2d 97, judgment reversed 334 U.S. 813 8
Plessy v. Ferguson, 163 U.S. 537 ..... 11, 24

Reynolds v. Sims, 377 U.S. 533 14

Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 4
Shelley v. Kraemer, 334 U.S. 1 8
Springfield School Committee v. Barksdale, 348 F.2d 261 (1st Cir. 1965) 16, 20
Sweatt v. Painter, 339 U.S. 629 11

Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 5

United States v. General Motors Corp., 323 U.S. 373 4
United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966), aff'd, en banc per curiam (March 29, 1967) 16, 17, 18, 20

PAGE

Wesberry v. Sanders, 376 U.S. 1 14
West Virginia State Board of Education v. Barnette, 319 U.S. 624 15

Other Authorities

Horowitz, Unseparate But Unequal—The Emergency Fourteenth Amendment Issue in Public Education, 13 U.C.L.A. L. Rev. 1147 (1966) 24

1967 Report of the United States Commission on Civil Rights, Racial Isolation in the Public Schools 15, 21, 22

Wright, Public School Desegregation: Legal Remedies for De Facto Segregation, 40 NYU L. Rev. 285 (1965) 24

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cause on December 6, 1966.

Opinions Below

The opinion of the district court is reported at 244 F. Supp. 572 (S.D. Ohio, 1965) and appears at page 258a.[1]

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[1] The record citation referred to above and hereinafter as (——a) is that portion of the record printed in connection with the hearings in the court of appeals. This volume contains pages 1a-282a. By order of the court below, petitioners were not required to print the exhibits and a 71 page stipulation introduced at trial. The exhibits are collected in a bound blue volume entitled "Exhibits to Appendix of Plaintiffs-Appellants." This volume is separately indexed and paginated 283a-479a. The stipulation appears in a red volume, is separately indexed and will be referred to as Stipulation ——, p. ——. Plaintiffs' Exhibit 4 is also bound separately. Reference is also made to respondents' appendix which appears in a green volume and is paginated ——b. The appendix attached to the petition is referred to as App. ——a.

as a part of the record below. The opinion of the court of appeals is reported at 369 F. 2d 55 and is appended hereto *infra* at page App. 1a.

Jurisdiction

Judgment of the court of appeals was entered on December 6, 1966. Petitioners were given to and until May 5, 1967 in which to file this petition pursuant to an order by Mr. Justice Brennan entered on March 2, 1967. The jurisdiction of this Court is invoked under Title 28, Section 1254(1).

Questions Presented

1. Whether Negro students' complaint that they are deprived of equal educational opportunities as a result of public school board policies which confine them to racially imbalanced schools states a cause of action under the Fourteenth Amendment in the absence of school board contrivance.

2. Whether, consistent with the due process requirements of the Fourteenth Amendment, a school board may refuse to develop reasonable alternatives to policies and practices which isolate and thereby impair the learning ability of Negro students.

Preliminary Statement

Negro petitioners, by their complaint filed in November 1963 and the evidence presented at trial in June 1965, sought to challenge, *inter alia*, the Cincinnati Board of Education's (hereinafter called the school board) failure to undertake reduction of systemwide racial imbalance which deprived them of and denied to them equal educational opportunity as required by the Fourteenth Amendment to the Constitution of the United States. Evidence was introduced to show that (1) the school board's past practice of maintaining dual schools and present acts of racial gerrymandering were directly responsible for the present resultant segregation complained of; (2) the existing racial isolation in the schools was being perpetuated, entrenched and extended as a by-product of racially discriminatory practices engaged in by the public agencies as well as private parties which control the housing market; and (3) psychological and educational damage is inflicted upon Negro children because of and by virtue of their confinement in racially imbalanced schools.

The court below ruled that a denial of equal opportunity resulting from acts of the school board that are not racially motivated does not make out a cause of action under the Constitution or laws of the United States; and that the participation of public agencies in the creation of racially segregated residential enclaves which, when coupled with the policies of the school board inexorably results in school segregation, bears no relevance to the instant complaint.

By remanding this cause to the trial court solely for presentation of evidence to prove specific instances of gerrymandering by the school board and to support those allegations in the complaint that Negro children are provided with inferior programs in certain schools, the court below has ruled that the denial of educational opportunity resulting from racial imbalance cannot be the basis of

relief. Thus, it has in fact entered judgment authorizing the maintenance and continuance of a racially imbalanced school system absent school board contrivance, no matter what the resultant deprivation of equal educational opportunities to Negro children.

Although the remand back to the district court is for the taking of additional evidence and for findings on the issues "of claimed discrimination in specific schools and programs and claimed harm to Negro students" (App. 16a), the tenor of the court's opinion leaves little doubt that any additional testimony and findings would be limited to racially motivated school board decisions and inferior programs in racially imbalanced schools. The court of appeals' decision thus increases the burden which would have been placed upon petitioners under the moribund "separate but equal" doctrine in that pursuant to the court's opinion not only must petitioners establish the existence of concrete inferior facilities, but it must also be shown what harm is caused thereby.

Because the theory that the administrative policies and practices of the school board necessarily bring about racial isolation of Negro children and a resultant unconstitutional denial of educational quality is central to this case, petitioners urge that the decision below is now ripe for review. See *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148; *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427. Even if this Court were to consider the decision below as non-final, it is respectfully submitted that *certiorari* should nonetheless be granted since resolution of the question as to the constitutional or legal validity of denial of equal educational opportunity caused by *de facto* segregation is fundamental to the further conduct of this litigation. See *United States* v. *General Motors Corp.*, 323 U.S. 373, 377; *Land* v. *Dollar*, 330 U.S. 731, 734, n. 2; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n. 3. Cf. *Brady* v. *Maryland*, 373 U.S. 83, 85, n. 1.

While this Court may reach back and correct the claimed constitutional errors existing in the present posture of this cause if the cause is brought here after remand, *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-258, petitioners will be barred from developing fully all the issues on the present remand, thereby necessitating a second remand for the taking of additional evidence at some far distant date in the event the court below is in error about the constitutional validity of *de facto* school segregation insofar as it denies equality of educational opportunity. Moreover, preliminary relief to prevent the building of new segregated schools was sought and denied more than three years ago (1a). Further delay in resolving petitioners' basic contention that racial imbalance must be corrected in order for them to obtain an equal education only serves to increase the difficulty of developing an adequate remedy.

For all these reasons petitioners bring the cause here.

Statement

Although the State of Ohio repealed its law requiring separate schools for Negroes in 1887 (93b; 284a), the school board maintained varying numbers of non-districted schools exclusively for Negro children and staffed solely by Negroes, the last of which was closed in 1955 (92b-102b; 284a-289a; Stipulation 61, p. 57). No Negro teacher was permitted to work in a school which contained white children until 1949 (102b).

Ironically, in 1950 when the school board operated four such non-districted Negro schools (Stipulation 61, p. 57), there was more integration in the system than there is today. At that time, only 18% of all Negro children attended secondary schools which were more than 80% Negro; and 45% of the Negro elementary school children

attended schools which were more than 80% Negro that same year.[2]

Fifteen years later, when this case was tried, and when all of the non-districted segregated schools had been closed for at least ten years, the level of segregation had substantially increased. Forty-three (43) per cent of all Negro secondary school children and 63% of all Negro elementary school children in the school system were confined to more than 80% Negro schools. In sum the number of Negro children attending majority Negro schools had risen from seven out of ten to almost nine out of ten.

The school board maintained 96 regular elementary and secondary schools in the 1964-65 school year. Approximately 37% of the 87,760 children attending these schools were Negroes (Stipulation 3, pp. 2-3). One of the seven senior high schools was more than 80% Negro attended and four were more than 80% white attended. Four of the 17 junior high schools were more than 80% Negro attended and six were more than 80% white attended. Fifteen of the 72 elementary schools were more than 80% Negro attended and 37 were more than 80% white attended. Two elementary schools were all Negro and 12 were all-white as were three junior high schools (173b-178b).

The school board claims to district its schools on the basis of natural boundary lines and its objective is to develop schools into neighborhoods "that can communicate in some way" (103a-104a). The superintendent and assistant superintendent testified that "community homogeneity" was a positive attribute to be considered in school districting. The latter called it "a plus factor in the operation of the schools" (126a), while the former stated that one of the advantages of the neighborhood school plan was that it gave school officials knowledge of the back-

[2] These percentages in this and the following paragraph have been calculated from the enrollment figures which appear at 173b-178b.

ground of the families and "their place in the community" (104a). School administrators commonly consider the racial composition of proposed attendance areas as a factor in school districting (86a, 125a, 130a).

After this suit was filed, the school board released a statement that it "would like to avoid predominantly Negro schools . . . [and] is willing to make race of students one of the elements to be considered in the establishment of school attendance lines . . . [but] does not accept the concept of *de facto* segregation and will not agree to any . . . program to attempt to balance races as such" (54b-55b). In the one case where the school board claims to have implemented this policy, it built a new school in a "neighborhood" previously served by one school and planned to district it so there would have existed in the one neighborhood one all-white school and one all-Negro school (42a, 432, 244a). As a result of school board action in purported application of the above policy, the original elementary school showed a 15% increase in Negro attendance to 71% Negro, while the new school opened as a 92% white school (Stipulation 49, pp. 39-40). There was no other evidence of claimed implementation of this new policy, although many projected schools are clearly designated for Negro areas.[3]

Petitioners were denied the right to introduce into evidence an official report prepared by the Ohio Civil Rights Commission in 1964 which concluded that housing was segregated in Ohio cities, including Cincinnati, as a result of the policies of both public and private agencies (150a-

[3] The planned East Evanston, East Avondale and Millvale area schools will be predominantly Negro (61a, 62a, 63a). Examination of Joint Exhibit 271 (165b) which is a map prepared by respondents to indicate projected locations for new schools, reveals that elementary schools are also planned for the Columbian, Cummins, West Evanston and Hays areas. A map of Negro residential areas (112b), shows that these are Negro areas.

151a).[4] However, the testimony of Joseph Murphy, Director of Relocation for the City of Cincinnati Department of Urban Development and responsible for family relocation resulting from all governmental projects (149a), was received. He stated that his department referred Negro families only to those areas where they would be accepted; that his department was aware of the fact that there were certain areas in which Negroes were not accepted and that housing units were made available to his department on a racial basis (149a-150a). A member of the school board also admitted that, to his knowledge, there are areas in Cincinnati where Negroes are restricted from obtaining housing (60a-61a). Before *Shelley* v. *Kraemer*, 334 U.S. 1, restrictive covenants were enforced in the state of Ohio. See *Perkins* v. *Trustees of Monroe Avenue Church of Christ*, 79 Ohio App. 457, 70 N.E. 2d 487 (1946), *app. dismissed*, 147 O.S. 537, 72 N.E. 2d 97 (1947), *judgment reversed*, 334 U.S. 813.

Both petitioners' educational expert, Dr. Phillip Rothman and their social psychologist and race relations expert, Dr. Lee Rainwater, testified that the Negro children who are compelled to attend racially imbalanced schools[5] are seriously harmed thereby (158a, 205a). These experts also made explicit that this harm resulted even though the compulsion to attend the racially imbalanced schools was not the result of state laws requiring a bi-racial school system (159a, 206-207a), and some white children attend the predominantly Negro schools (191a, 207a).

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[4] The report, Discrimination in Housing in Ohio, appears in the record as a separate pamphlet, labeled "Plaintiff's Exhibit No. 4." Petitioners had called the Deputy Executive Director of the Commission in order to introduce and testify about the report (150a-151a).

[5] Dr. Rainwater testified that within a context of the Cincinnati schools and their racial compositions, more than 50% Negro-attended schools were racially imbalanced to the point where they harmed the Negro children in attendance (204a).

To illustrate that Negro children were harmed as a result of their confinement in racially imbalanced schools, Dr. Rothman compared the achievement test results of the 80% or more Negro-attended schools with those of the 80% or more white-attended schools (162a-163a). He found that the learning ability, as measured by I.Q. tests of the children attending the predominantly white schools improved as they went through school, while these tests showed that children attending the predominantly Negro schools lost some of the learning ability they had started with (165a-167a; 167b). The test results further revealed that while the children in the predominantly Negro schools were slightly behind (four-tenths of a grade) the children in the predominantly white schools in reading ability in the second grade, this gap had widened to two and four-tenths grade levels by the eighth grade (167a-168a; 168b). A similar pattern was revealed by study of arithmetic achievement test scores (169a; 169b).

Dr. Rainwater emphasized that even if the children in all the predominantly Negro schools did as well as the children in the predominantly white schools on standardized tests, they would still be damaged:

> . . . In a school system in which the children were doing equally well on tests, one would still expect to find them disadvantaged in the area of developing skill to deal with white societies, disadvantaged in the terms of a negative conception of themselves and feelings that they are somehow different and less worthy persons because of being treated in this way (208a).

This conclusion was based on Dr. Rainwater's earlier testimony that:

> . . . The Negro children attending schools which are heavily Negro . . .. constantly internalize, make as a part of their sense of themselves, the sense that they are Negro, that they are different from the rest of the world—and because of the position of the

> Negro historically in this country, that differentness is a negative thing; . . . they become increasingly discouraged about the possibility of moving out of this kind of situation, and they tend therefore to have lower motivations, and accomplish less, because, well, it simply appears to them, it is not worth trying, it is not worth making an effort in a system which sets you so much apart and so much down—both apart and down (205a).
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> • • •
>
> . . . They learn few of the ways of the white world, few of the skills for dealing with that world, and for operating successfully in that world, and therefore when they finally get out of school and have to move out into the predominantly white world in order to do well at jobs, they are less able to deal with that system as it exists. This has the further effect, of course, that the whites with whom they deal . . . tend to stereotype them further and to feel that they are not as well prepared as a comparable Negro or white child coming from an integrated school system (205a-206a).

At the close of the school board's factual presentation with the exception of expert testimony, and before rebuttal, petitioners' amended complaint was dismissed on a Motion for Judgment.

Reasons for Allowance of the Writ

1. The court below, by ruling that a school board may impair "a Negro student's capacity to learn" (App. 15a-16a) free from constitutional interdiction unless racial motivation is established, has misconceived the reach of the Fourteenth Amendment to the United States Constitution.

No other area of the law better illustrates the dynamic qualities inherent in the Fourteenth Amendment to the United States Constitution than school desegregation litigation. At no time has this Court held that the Fourteenth Amendment's mandate of equal educational opportunities

was affected by the motives of school officials. Before the Court considered segregation as infringing upon the constitutional requirements of equal educational opportunity, it struck down a state's good faith practice of providing Negroes with funds to attend out-of-state educational facilities where equal programs were not available to them at the state university. See *Missouri ex rel Gaines* v. *Canada*, 305 U.S. 337. In subsequent decisions, the Court focused on the question of whether the separation itself denied equality of opportunity. In *Sweatt* v. *Painter*, 339 U.S. 629, 634, "qualities which are incapable of objective measurement" became the pivotal factor in the determination that a state-operated Negro law school would necessarily be inferior to that of the University of Texas. The Court concluded that legal training could not be "effective in isolation from the individuals and institutions with which the law interacts."

McLaurin v. *State Regents*, 339 U.S. 637, further clarified the thesis that any separation at all between Negroes and whites adversely affects the former's ability to learn. Regulations limiting the peer contact available to a Negro graduate student attending an otherwise all-white graduate school were therefore struck down.

Sweatt and *McLaurin* viewed the effect of segregation —the inability of the Negro student to freely associate with the white student—as an unconstitutional limitation on the Negro student's learning experience. When the Court decided *Brown* v. *Board of Education*, 347 U.S. 483, the concepts of the constitutional import of equal educational opportunity distilled from *Sweatt* and *McLaurin* led to the invalidation of segregation in the public schools and the repudiation of the "separate but equal" doctrine of *Plessy* v. *Ferguson*, 163 U.S. 537. *Brown* ruled what *Sweatt* and *McLaurin* had intimated and inferred: A separate education for Negroes in a white dominated society is "inherently unequal."

Although the relief granted in *Brown* represented a radical departure from prior cases where the segregated educational structure itself was allowed to stand, the Court adhered to its historic approach of determining whether the challenged practices, no matter what the context in which they arose, limited educational opportunities.

The court below, while reciting the standard established by this Court after more than fifty years of tortuous litigation—that Negroes are entitled to equal educational opportunity—has discarded the underlying philosophy employed in the concept's development. Thus regarded as irrelevant is the basic constitutional question—does racial isolation deny equal education to Negroes?

The court below has read *Brown's* mandate as being operative only against school boards that have acted with open racial hostility. This limitation leads to the absurdity that has developed in the Tenth Circuit. That court affirmed two decisions which have reached diametrically opposed conclusions on the same facts. *Board of Education* v. *Dowell*, — F. 2d —, (10th Cir. decided Jan. 23, 1967), mandates affirmative action to bring about integration, while *Downs* v. *Board of Education*, 336 F. 2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914, imposes no duty to integrate. The sole distinction is one of form, not substance; it rests upon the divergent findings of the trial courts regarding the motivations of the respective school boards. So, too, under the mandate of the court below, some of Cincinnati's schools could be ordered integrated while others would remain segregated on the basis of good or bad faith in each challenged administrative decision.

What both the Tenth Circuit and the court below have lost sight of is the nature of the claim made by segregated children. Their rights to an equal educational opportunity have become contingent upon facts which bear no relationship to the educational process. It is respectfully submitted that *certiorari* should be granted to remove the miscon-

ception that the Fourteenth Amendment does not reach state-imposed deprivations merely because the context in which they occur varies from *Brown*.

2. The school board's failure to operate the schools in a manner which would enable Negro children to progress consistent with their abilities cannot be justified on the ground that these children have not been purposefully singled out for adverse treatment. Fundamental concepts of due process require that the validity of challenged state regulations be determined by their effect. This Court, for example, has made clear that a state may not establish procedures which disadvantage certain persons merely because they do not have the advantages of society's more fortunate members. *Griffin* v. *Illinois*, 351 U.S. 12; *Douglas* v. *California*, 372 U.S. 353.

In *Griffin*, convicted indigents were unable to avail themselves of a right to appeal because they were not provided with a transcript. Rejecting the contention that "[a]ll that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action,"[6] the Court looked to the effect of the law upon economically disadvantaged persons. It ruled that the state's failure to make available to all persons the same opportunity for appeal was violative of both the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

So, too, the Court in *Douglas* struck down a California rule of criminal procedure which required a determination of the California District Court of Appeals before an indigent was entitled to counsel on appeal as of right. Again, the determination was based on the concept that due process is violated when uniformly applied state regulations in-

[6] This view, expressed in a dissent, 351 U.S. at 34, is specifically rejected by the majority at 351 U.S. 17, n. 11.

evitably limit a poor man's ability to defend himself. In neither *Griffin* nor *Douglas* was the state's purpose in establishing procedure—in order to conserve public funds or to avoid overburdening the courts—held to justify the limitations placed upon the individuals affected.

This Court held in *Daniel* v. *Family Security Life Insurance Co.*, 336 U.S. 220, 224, ". . . a judiciary must judge by results. . . . We cannot undertake a search for motive in testing constitutionality." Similarly, the test of proper apportionment is the result—"one man, one vote"—not motive or cause which led to malapportionment. *Wesberry* v. *Sanders*, 376 U.S. 1. Moreover, the state is under an affirmative duty to insure that "population shifts and growth" do not result in further malapportionment. *Reynolds* v. *Sims*, 377 U.S. 533, 583-584. States cannot, as should not school boards, turn their backs on population shifts, which bring about obvious inequalities.

Petitioners do not here contend that a board of education has the obligation to reduce racial isolation over which it has absolutely no control. Where a school board, however, has chosen to enforce a set of regulations which inexorably must result in racial isolation for a substantial proportion of Negro school children in the face of reasonable alternatives which would deprive far fewer, if any, Negroes of equal educational opportunities, the effect of its regulations must be subject to constitutional challenge. While boards of education must house pupils, their primary constitutional responsibility is to provide educational opportunities for all pupils on an equal basis without distinctions or detriment based upon race.

Petitioners in the instant case face damages far greater than those which plagued the indigents in *Griffin* and *Douglas*. In these latter cases, the state courts at least entertained requests for relief but denied them on the ground that the claims were not meritorious. By contrast, the school board has rejected outright "the concept of

de facto segregation and will not agree to any proposal to bus students, to transfer classes or any other program to attempt to balance races as such" (Stipulation 11, p. 7). The school board takes this position even though it has been established that its present school districting policies have the effect of hardening patterns of segregation, and result in a denial of educational opportunities to Negro children.

Griffin and *Douglas* might not apply if the school board had chosen the only rational approach toward school districting. The record, however, does not support such a distinction. The school board has not shown that racial imbalance cannot be relieved in its system consistent with sound educational procedures. To the contrary, its superintendent has testified that it is not the duty of the board to achieve balance (117a). Further, he stated that, although he was aware of methods to integrate some of Cincinnati's schools, he was unwilling to recommend their implementation (249a-250a). That solutions are available is now common knowledge. See the 1967 Report of the United States Commission on Civil Rights, *Racial Isolation in the Public Schools,*[7] Vol. I, pp. 140-170. The administrative latitude necessary for the proper functioning of a board of education does not exempt it from the prohibitions against arbitrariness imposed by the Fourteenth Amendment. *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 637. And arbitrariness, as *Barnette* teaches, exists when "free public education . . . [is] partisan or enemy of any class, creed, party, or faction."

This Court has accepted as a cardinal principle that the Fourteenth Amendment is violated when government regulations are inherently unfair to a particular class. By closing the door on petitioners' complaint, the court below has differentiated the claims of Negro school children from

[7] The report is hereinafter referred to as Racial Isolation in the Public Schools.

all other cases arising under the Fourteenth Amendment. This result is particularly ironic in view of the Amendment's primary purpose of insuring first-class citizenship for Negroes.

3. There is an irreconcilable conflict among the courts of appeals in respect to the basic question raised by this petition—is a valid constitutional claim made where Negro children contend that *de facto* school segregation and racial imbalance deny them equal education? The *ratio decidendi* of the court below is in accord with that of the Seventh Circuit in *Bell* v. *School City of Gary*, 213 F. Supp. 819 (N.D. Ind. 1963), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924. The Fifth Circuit, in *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966),[8] *aff'd. en banc per curiam* (Mar. 29, 1967),[9] has taken a different approach to this question as has the First Circuit in *Springfield School Committee* v. *Barksdale*, 348 F.2d 261 (1st Cir. 1965). The Tenth Circuit (compare *Downs* v. *Board of Education, supra*, with *Board of Education* v. *Dowell, supra*) is in conflict within itself.

Factually, *Jefferson* and the instant case can be distinguished only to the extent that the school boards involved in the *Jefferson* litigation began the process of eliminating its dual school system approximately ten years later than the school board here. Also, the policy of formal segregation was a more universal phenomenon in school districts affected by the decision in the *Jefferson* case. While the court below relies upon the repeal of Ohio's segregation law in 1887 as distinguishing the form of school segregation existing in Cincinnati from that in the South and placing the former beyond the reach of the Fourteenth Amendment, this rationale begs the question. The *Jefferson* decision requires integration when

[8] Hereafter, this opinion will be referred to as Jefferson I.

[9] Hereafter, this opinion will be called Jefferson II.

school districts in the Fifth Circuit reorganize their dual school system into unitary ones. Enforcement of *Jefferson* bars the development of *de facto* school segregation in the school districts in which the *Jefferson* holding is controlling.

No matter how this record is viewed, it is obvious that the shift, beginning in the 1880's, from an openly operated dual school system was not completed until the 1950's. At no time was the school board required to adopt policies and practices which would require integration of the schools, nor did it do so. As a result, there has been an ever-increasing development of racial isolation of Negro students with the consequential deprivation to them of equal educational opportunities. The court below, unlike the court in *Jefferson,* does not seek to halt this isolation but, in fact, condones it as being outside the purview of the Constitution of the United States.

That such an end result could not flow from *Brown* is the basic concept in the *Jefferson* case. It interprets the *Brown* decision as stemming in large part from this Court's holding that segregation was harmful to the educational development of Negro children. The Fifth Circuit echoed its agreement with the 1954 sociological findings when it stated that "denial of access to the dominant culture" results in second-class citizenship for Negroes. (*Jefferson I,* 372 F.2d at 866). While aware that northern and southern school cases could be superficially distinguished on the basis of the existence or nonexistence of overt and express racial discrimination, the Fifth Circuit stated:

> . . . Brown points toward the existence of a duty to integrate de facto segregated schools . . . (*Jefferson I,* 372 F.2d at 875).

The dissenters in *Jefferson II,* although disturbed by the breadth of the relief mandated, took note of the obvious

fact that the *de facto-de jure* distinction is artificial and ignores reality:

> The Negro children in Cleveland, Chicago, Los Angeles, Boston, New York, or in any other area of the nation which the opinion classified under de facto segregation, would receive little comfort from the assertion that the racial make-up of their school system does not violate their constitutional rights because they were born into a de facto society, while the exact same racial make-up of the school system in the 17 Southern and border states violated the constitutional rights of their counterparts, or even their blood brothers, because they were born into a *de jure* society. All children everywhere in the nation are protected by the Constitution, and treatment which violates their constitutional rights in one area of the country, also violates such constitutional rights in another area. The details of the remedy to be applied, however, may vary with local conditions. Basically, all of them must be given the same constitutional protection. Due process and equal protection will not tolerate a lower standard, and surely not a double standard. The problem is a national one. (Slip opinion, pp. 26-27).

The decision below and *Jefferson* also conflict in that the latter culminates the 5th Circuit's awareness that school segregation problems cannot be considered apart from overall patterns of segregation. As early as 1958 the Fifth Circuit condemned a neighborhood school plan which resulted in school segregation because of segregated housing patterns. See *Holland* v. *Board of Public Instruction,* 258 F.2d 730 (5th Cir. 1958). The interrelationship between school segregation and housing segregation is underscored in *Jefferson I* which cites with approval *Dowell* v. *School Board of Oklahoma City Public Schools,* 244 F. Supp. 971 (W.D. Okla. 1965). *Dowell* was in large part predicated upon the trial court's understanding that desegregation necessitated affirmative action by school authorities because of residential segregation.

By contrast, the court below determined that housing segregation, even when caused by the actions of public agencies, was irrelevant to the question of school segregation (App. 7a, n. 4). The court therefore refused to consider the conclusion of the Ohio Civil Rights Commission which found that the state's racial ghettos were the product of both state and private action:

> The major conclusion to be drawn is inescapable. There exists throughout Ohio a consistent pattern whereby Negroes, and other minority groups, are denied free choice in housing. It is invalid to attribute this condition solely to the personal desires or prejudices of home owners. Patterns of exclusion, discrimination and segregation have become institutionalized and constitute a major component of the practices of the housing and real estate business, broadly defined to include real estate brokers and salesmen, landlords, builders and developers, mortgage lending institutions, and governmental housing agencies.[10]

The Fifth Circuit has concluded realistically that racial discrimination in public education cannot be eliminated and the objective of the Fourteenth Amendment to insure equal educational opportunities for Negro children cannot be attained without integration. By contrast the Sixth Circuit has ignored the continuing history of second-class citizenship for Negroes in Cincinnati, and has refused to recognize that the product of racially isolated schools—educationally deprived children—is merely the end result of a publicly and privately inflicted wrong left uncorrected. Being blind to this reality, it has construed the Fourteenth Amendment so narrowly that this guarantee has been stripped of its dynamic quality to secure "equal protection" in all contexts and under all circumstances.

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[10] 1964 Ohio Civil Rights Commission, Discrimination in Housing in Ohio, 48. The report states that Cincinnati was one of the cities studied. It appears in the record as plaintiffs' exhibit 4; however, this exhibit was not admitted (150a-151a).

While the facts in *Jefferson* reveal a more open form of racial segregation than those in the case below, *Springfield School Committee* v. *Barksdale, supra,* indicates how severe racial concentrations may occur in a public school system in the absence of a history of overt discrimination. While the First Circuit vacated a decision on the merits in favor of Negro school children based upon educational deprivation flowing from racially imbalanced schools, the complaint was dismissed without prejudice to institute a new action in the event that the Springfield School Committee did not keep its stated promise to remedy the evil voluntarily and without the necessity of judicial intervention. In short, the First Circuit found that the complaint stated a cause of action upon which relief could be granted. The court held at page 266:

> ... It would seem no more unconstitutional to take into account plaintiffs' special characteristics and circumstances that have been found to be occasioned by their color than it would be to give special attention to physiological, psychological or sociological variances from the norm occasioned by other factors. That these differences happen to be associated with a particular race is no reason for ignoring them.

Thus, the *Barksdale* decision is at variance with the holding in this cause.

The decisions in the Tenth Circuit are irreconcilable. *Downs* v. *Kansas City School Board, supra,* accords with the *ratio decidendi* of this case. *Board of Education* v. *Dowell,* on the other hand, is in harmony with *Jefferson* and *Barksdale.* The difference between the two cases (see Point 1 *ante*) is that the trial court found good faith in the former case and bad faith in the latter. Thus, Kansas City School authorities, in reorganizing from a dual school system to a unitary one, have been permitted to continue practices and procedures which have insured that the racial concentration and separation of Negro and white children re-

mained virtually unchanged when the transformation was completed. In the *Dowell* case, however, the Oklahoma City School Board, in making the transformation, is being required to avoid practices and procedures which will result in *de facto* school segregation.

The law is in a state of confusion among the Circuits as to the scope and reach of the Fourteenth Amendment in respect to practices and procedures which cause racial isolation and result in educational deprivation. In the Fifth Circuit *de facto* school segregation is outlawed, permitted in the Sixth and Seventh, questioned in the Tenth, and disallowed in the First Circuit. It is respectfully submitted that *certiorari* should be granted in this cause so that this conflict and confusion can be finally resolved.

4. This case raises questions of national public importance. Cincinnati's staggering increase in school segregation during the past 15 years has been experienced by virtually every other northern city. See *Racial Isolation in the Public Schools, supra,* Vol. 1. pp. 2-9. The report at p. 190 unequivocally concludes that racial isolation as it exists in Cincinnati and throughout the urban North impairs Negro students' capacity to learn:

> The central truth which emerges from this report and from all of the Commission's investigations is simply this: Negro children suffer serious harm when their education takes place in public schools which are racially segregated, whatever the source of such segregation may be.
>
> Negro children who attend predominantly Negro schools do not achieve as well as other children, Negro and white. Their aspirations are more restricted than those of other children and they do not have as much confidence that they can influence their own futures. When they become adults, they are less likely to participate in the mainstream of American society, and more likely to fear, dislike, and avoid white Americans. The conclusions drawn by the U.S. Supreme Court about the impact upon children of

segregation compelled by law—that it "affects their hearts and minds in ways unlikely ever to be undone"—applies to segregation not compelled by law.

The major source of the harm which racial isolation inflicts upon Negro children is not difficult to discover. It lies in the attitudes which such segregation generates in children and the effect these attitudes have upon motivation to learn and achievement. Negro children believe that their schools are stigmatized and regarded as inferior by the community as a whole. Their belief is shared by their parents and by their teachers. And their belief is founded in fact.

Isolation of Negroes in the schools has a significance different from the meaning that religious or ethnic separation may have had for other minority groups because the history of Negroes in the United States has been different from the history of all other minority groups. Negroes in this country were first enslaved, later segregated by law, and now are segregated and discriminated against by a combination of governmental and private action. They do not reside today in ghettos as the result of an exercise of free choice and the attendance of their children in racially isolated schools is not an accident of fate wholly unconnected with deliberate segregation and other forms of discrimination. In the light of this history, the feelings of stigma generated in Negro children by attendance at racially isolated schools are realistic and cannot easily be overcome.

Racial Isolation in the Public Schools also presents substantial evidence at pp. 107-108 that integration significantly improves the achievement of Negro children without adversely affecting the educational performance of other children.

Access to a beneficial public educational experience serves as the primary means by which most American children are equipped to survive in their complex technological society. For Negroes, the failure adequately to learn in public school forecloses any possibility that they may take advantage of any of the occupational opportunities

which are just beginning to be made available without regard to race. Escape from the vicious cycle of second-class citizenship begins with equal educational opportunities.

The Fourteenth Amendment is now more than one century old. Political opportunism and stifling constitutional interpretation served to emasculate its reach and thereby subvert its purpose. With the post-World War II decisions of this Court and the passage of new civil rights legislation, however, the original objectives have once again appeared within reach. But the failure of local boards of education to provide equal educational opportunities for Negroes has threatened to forestall full implementation. It is now painfully obvious that local school boards, North and South, will provide an integrated—and therefore equal—educational experience only if compelled to do so. Instead, boards have relied upon compensatory educational programs, administered in racially segregated settings, which have uniformly failed to overcome the disparities that exist between isolated Negro children and their peers.[11] The belief of the court below that "it is the wiser course to allow for the flexibility, imagination and creativity of local school boards in providing for equal opportunity in education for all students" is therefore an exercise in wishful thinking which leads to constitutional nullification.

Just as after the First Reconstruction, resistance to integration has become a political necessity in virtually every section of the country. Only constitutional interpretation can prevent the continuation and growth of this new and equally virulent form of segregation. For these rea-

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[11] Racial Isolation in the Public Schools, 140, concludes: "The evidence reviewed here strongly suggests that compensatory programs are not likely to succeed in racially and socially isolated school environments."

sons, legal scholars [12] as well as the Fifth Circuit [13] have designated the questions presented by this petition as ones which demand the attention of this Court.

The failure to mandate adequate consideration of the special problems which Negro children face in the public schools—problems caused by the dominant white society through all of its apparatus including myriad governmental agencies—could easily stand as a national disaster resulting from constitutional interpretation second only to that engendered by *Plessy* v. *Ferguson*.

CONCLUSION

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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[12] See Wright, Public School Desegregation: Legal Remedies for De Facto Segregation, 40 NYU L. Rev. 285, 307 (1965); Horowitz, Unseparate But Unequal—The Emergency Fourteenth Amendment Issue in Public Education, 13 UCLA L. Rev. 1147, 1154 (1966).

[13] Jefferson I, 372 F. 2d at 879.

APPENDIX

Opinion of the United States Court of Appeals for the Sixth Circuit, December 6, 1966

Before WEICK, Chief Judge, O'SULLIVAN and PHILLIPS, Circuit Judges.

WEICK, Chief Judge. The suit in the District Court was a class action against the Board of Education of the City of Cincinnati, brought by the parents and next friends of Negro pupils enrolled in the public schools of the city, to enjoin the operation of allegedly racially segregated public schools, to enjoin the construction of new schools on sites which would increase and harden alleged existing patterns of racial segregation, and for declaratory and other relief.

The Board denied that it created, operated or maintained racially segregated schools, and alleged that the only genuine issue in the case was whether it violated the constitutional rights of the plaintiffs by refusing to adopt and enforce an affirmative policy of balancing the races in the Cincinnati Public School System.[1]

[1] On March 9, 1964, after the commencement of the present action, the Board of Education adopted the following policy statement to guide its officers and employees:

"(1) As a matter of policy, the Board would like to avoid predominantly Negro schools to the extent that the Board has any control over the causes which create such predominance. But in exercising any control in this area the Board will not deviate from the long established neighborhood school plan or the requirement of Section 3313.48 R.C. that schools be located where they will be most convenient for the largest number of students.

"The Board is willing to make race of students one of the elements to be considered in the establishment of school attendance zone lines so long as this can be done consistently with the neighborhood school policy, the requirements of Section 3313.48, and the numerous factors which have always been considered in establishing such zone lines as—safety of children, travel distance and capacity of school.

"(2) The Board does not accept the concept of de facto segregation and will not agree to any proposal to bus students, to transfer classes or any other program to attempt to balance races as such."

The evidence in the case consisted of a number of lengthy stipulations, exhibits, and oral testimony. At the close of plaintiffs' evidence defendants moved for judgment, which motion was taken under advisement by the Court. Defendants presented their entire case except for expert testimony. The Court then granted defendant's motion for judgment without considering the evidence offered by the defendants. He handed down an opinion which he adopted as findings of fact and conclusions of law under Rules 41(b) and 52(a), Fed.R.Civ.Proc.[2] In essence, the Court held that there was no constitutional duty incumbent upon the Board to balance the races in the public school system, and that there was a failure of proof on the part of the plaintiffs to establish a policy of segregation or gerrymandering on the part of the Board.

WAS THERE A CONSTITUTIONAL DUTY ON THE PART OF THE BOARD TO BALANCE THE RACES IN THE CINCINNATI PUBLIC SCHOOLS WHERE THE IMBALANCE WAS NOT CAUSED BY ANY ACT OF DISCRIMINATION ON ITS PART?

At the outset it should be pointed out that the State of Ohio abolished segregation in the public schools on February 22, 1887, which was more than 67 years before the United States Supreme Court barred it on constitutional grounds in the momentous decision of *Brown* v. *Board of Education*, 347 U.S. 483 (1954).[3]

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[2] *Deal* v. *Cincinnati Board of Education*, 244 F.Supp. 572 (S.D. Ohio 1965).

[3] 84 Ohio Laws 34, enacted Feb. 22, 1887. The Supreme Court of Ohio upheld and enforced the law in the following year, *Board of Education* v. *State*, 45 Ohio St. 555, 16 N.E. 373 (1888).

The Cincinnati school system discontinued compulsory segregation promptly after the enactment of this Ohio Statute in 1887. Since that time Negro students have had the opportunity to attend the neighborhood schools in Cincinnati on the same basis as white students living in the same localities.

The so-called neighborhood plan for the location of public schools is authorized by statute under which Ohio School Boards are required to—

> "... provide for the free education of the youth of school age within the district under its jurisdiction, at such places as will be convenient for the attendance of the largest number thereof." Ohio Rev. Code § 3313.48.

We think the legislature had the power to enact this statute. The Cincinnati Board of Education has complied with it.

Appellants contend that the maintenance of a public school system in which racial imbalance exists is a violation of their constitutional right to the equal protection of the law. They assert that because the Negro student population is not spread uniformly throughout the Cincinnati school system, without a showing of deliberate discrimination or even racial classification, there is a duty of constitutional dimensions imposed on the school officials to eliminate the imbalance. Appellants claim that it is harmful to Negro children to attend a racially imbalanced school and this fact alone deprives them of equal educational opportunity.

The essence of the *Brown* decision was that the Fourteenth Amendment does not allow the state to classify its citizens differently solely because of their race. While the detrimental impact of compulsory segregation on the children of the minority race was referred to by the Court, it was not indispensable to the decision. Rather, the Court held that segregation of the races was an arbitrary exercise of governmental power inconsistent with the requirements of the Constitution.

A finding of educational or other harm is not essential to strike down enforced segregation. This is shown by

many subsequent cases nullifying separate facilities of all kinds with no evidence of harm.

In summarizing this principle, the Court said that classifications based on race violate the Fourteenth Amendment because they are obviously invidious and irrelevant. *Goss* v. *Board of Education,* 363 U.S. 683, 687 (1963).

Thus it is not necessary that a victim of racial discrimination prove that he was harmed in any specific material sense in order to invalidate state-imposed racial distinctions. See *Johnson* v. *Virginia,* 373 U.S. 61 (1963) (seating in courtrooms); *Watson* v. *Memphis,* 373 U.S. 526 (1963) (municipal parks); *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961) (restaurants in public buildings); *Dawson* v. *Mayor and City Council of Baltimore,* 220 F.2d 386 (4th Cir. 1955) aff'd 350 U.S. 877 (1955) (public beaches and bathhouses).

In *Bolling* v. *Sharpe,* 347 U.S. 497 (1954), which is a companion case to *Brown,* and which involved the validity of school segregation in the District of Columbia, the Court held that the Fifth Amendment was violated. The Court emphasized that it was the fact of discriminatory classification by the government that violated the Constitution, and looked no further for evidence of educational or psychological injury, saying—

> "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." *Bolling* v. *Sharpe, supra,* at 499.

The principle thus established in our law is that the state may not erect irrelevant barriers to restrict the full play of individual choice in any sector of society. Since it is freedom of choice that is to be protected, it is not necessary that any particular harm be established if it is shown that the range of individual options has been constricted without the

high degree of justification which the Constitution requires. It is harm enough that a citizen is arbitrarily denied choices open to his fellows.

Conversely, a showing of harm alone is not enough to invoke the remedial powers of the law. If the state or any of its agencies has not adopted impermissible racial criteria in its treatment of individuals, then there is no violation of the Constitution. If factors outside the schools operate to deprive some children of some of the existing choices, the school board is certainly not responsible therefor.

Appellants, however, argue that the state must take affirmative steps to balance the schools to counteract the variety of private pressures that now operate to restrict the range of choices presented to each school child. Such a theory of constitutional duty would destroy the well-settled principle that the Fourteenth Amendment governs only state action. Under such a theory, all action would be state action, either because the state itself had moved directly, or because some private person had acted and thereby created the supposed duty of the state to counteract any consequences.

The standard to be applied is "equal educational opportunity". The Court in *Brown* cast its decision thus because it recognized that it was both unnecessary and impossible to require that each child come through the complex process of modern education with the same end result. This approach grants due respect for the unavoidable consequences of variations in individual ability, home environment, economic circumstances, and occupational aspirations. Equal opportunity requires that each child start the race without arbitrary official handicaps; it does not require that each shall finish in the same time.

Appellants, however, pose the question of whether the neighborhood system of pupil placement, fairly administered without racial bias, comports with the requirements

of equal opportunity if it nevertheless results in the creation of schools with predominantly or even exclusively Negro pupils. The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and administration through the use of neutral easily determined standards, and better home-school communication. The Supreme Court in *Brown* recognized geographic districting as the normal method of pupil placement and did not foresee changing it as the result of relief to be granted in that case. *Brown* v. *Board of Education,* 347 U.S. 483, 495 note 13, question 4(a); *Brown* v. *Board of Education,* 349 U.S. 294, 300-01 (1955). But see *Blocker* v. *Board of Education of Manhasset,* 226 F.Supp. 208, 221-222 (E.D.N.Y. 1964).

Because of factors in the private housing market, disparities in job opportunities, and other outside influences, (as well as positive free choice by some Negroes), the imposition of the neighborhood concept on existing residential patterns in Cincinnati creates some schools which are predominantly or wholly of one race or another. Appellants insist that this situation, whieh they concede is not the case in every school in Cincinnati, presents the same separation and hence the same constitutional violation condemned in *Brown.* We do not accept this contention. The element of inequality in *Brown* was the unnecessary restriction on freedom of choice for the individual, based on the fortuitous, uncontrollable, arbitrary factor of his race. The evil inherent in such a classification is that it fails to recognize the high value which our society places on individual worth and personal achievement. Instead, a racial characterization treats men in the mass and is unrelated to legitimate gov-

ernmental considerations. It fails to recognize each man as a unique member of society.

In the present case, the only limit on individual choice in education imposed by state action is the use of the neighborhood school plan. Can it be said that this limitation shares the arbitrary, invidious characteristics of a racially restrictive system? We think not. In this situation, while a particular child may be attending a school composed exclusively of Negro pupils, he and his parents know that he has the choice of attending a mixed school if they so desire, and they can move into the neighborhood district of such a school. This situation is far removed from *Brown*, where the Negro was condemned to separation, no matter what he as an individual might be or do. Here, if there are obstacles or restrictions imposed on the ability of a Negro to take advantage of all the choices offered by the school system, they stem from his individual economic plight, or result from private, not school, prejudice.[4] We read *Brown* as prohibiting only enforced segregation.

The School Board, in the operation of the public schools, acts in much the same manner as an administrative agency exercising its accumulated technical expertise in formulating policy after balancing all legitimate conflicting interests. If that policy is one conceived without bias and administered

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[4] The District Court correctly excluded evidence of alleged discrimination in the public and private housing markets. Such discrimination is caused, if in fact it does exist, by persons who are not parties to this case and the Board has no power to rectify that situation. If appellants have any valid claim for infringement of their rights by public housing or urban renewal officials, they may obtain appropriate relief against them under the Fourteenth Amendment. With respect to private actions amounting to discriminatory practice, while there is no federal constitutional right available to appellants, they may seek relief from the state Civil Rights Commission or in the state courts, if relief is denied, under the provisions of the Ohio Fair Housing Law. Ohio Rev. Code § 4112.01-07.

uniformly to all who fall within its jurisdiction, the courts should be extremely wary of imposing their own judgment on those who have the technical knowledge and operating responsibility for the educational system. Thus, whereas such a geographical principle might be totally unacceptable in the administration of facilities such as beaches parks, restaurants, or golf courses (see desegregation cases cited above), the school system presents problems of an altogether different nature and the fair minded judgment of the school officials is entitled to full consideration in determining whether freedom of choice has been preserved for the children within the limits necessary for effective educational practice. See *Watson* v. *Memphis, supra,* at 531-532.

We hold that there is no constitutional duty on the part of the Board to bus Negro or white children out of their neighborhoods or to transfer classes for the sole purpose of alleviating racial imbalance that it did not cause, nor is there a like duty to select new school sites solely in furtherance of such a purpose.

The bussing of pupils away from the neighborhoods of their residences may create many special problems for boards of education. These include the providing of adequate transportation and proper facilities and personnel for the supervision, education and well being of *all* pupils. All of this must be accomplished within the Board's budget.

Although boards of education have no constitutional obligation to relieve against racial imbalance which they did not cause or create, it has been held that it is not unconstitutional for them to consider racial factors and take steps to relieve racial imbalance if in their sound judgment such action is the best method of avoiding educational harm. *Balaban* v. *Rubin,* 14 N.Y.2d 193, 199 N.E.2d 375 (1964), *cert. denied* 379 U.S. 881 (1964); *Morean* v. *Board of Education of Montclair,* 42 N.J. 237, 200 A.2d 97 (1964).

> "The tenor of these and related decisions . . . clearly indicates that the Fourteenth Amendment,

> while prohibiting any form of invidious discrimination, does not bar cognizance of race in a proper effort to eliminate racial imbalance in a school system." *Offerman* v. *Nitkowski*, 248 F.Supp. 129, 131 (W.D.N.Y. 1965)

In dealing with the multitude of local situations that must be considered and the even greater number of individual students involved, we believe it is the wiser course to allow for the flexibility, imagination and creativity of local school boards in providing for equal opportunity in education for all students. It would be a mistake for the courts to read *Brown* in such a way as to impose one particular concept of educational administration as the only permissible method of insuring equality consistent with sound educational practice. We are of the view that there may be a variety of permissible means to the goal of equal opportunity, and that room for reasonable men of good will to solve these complex community problems must be preserved. See Freund, *Civil Rights and the Limits of the Law*, 14 Buffalo L.Rev. 199, 205 (1964).

Moreover, our refusal to restrict the school board with a mathematically certain formula for the vindication of individual constitutional rights is not an innovation. The right to a trial by an impartial, fairly selected jury, is well established in our law and it has been protected against the same sort of disguised racial discrimination that has been attempted in the school desegregation cases. *Eubanks* v. *Louisiana*, 356 U.S. 584 (1958); *Smith* v. *Texas*, 311 U.S. 128 (1940); *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Ex parte Virginia*, 100 U.S. 339 (1879); *Strauder* v. *West Virginia*, 100 U.S. 303 (1879).

However, it is equally clear that a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which is to try him nor on the venire or jury roll from which petit jurors are

to be chosen. *Swain* v. *Alabama,* 380 U.S. 202, 208 (1965); *Akins* v. *Texas,* 325 U.S. 398, 403 (1945). While the two situations may not be completely analogous, the potential dangers to a criminal defendant forced to face a racially imbalanced jury, are at least as great as the intangible, often speculative injuries threatening a student in a racially imbalanced school. The cases recognize that the calculus of equality is not limited to the single factor of "balanced schools"; rather, freedom of choice under the Fourteenth Amendment is a function of many variables which may be manipulated differently to achieve the same result in different contexts.

If the separation in imbalanced schools is the result of racial discrimination, the officials must take steps to remedy the situation. However, the Constitution does not prescribe any single particular cure, and the mere fact of imbalance alone is not a deprivation of equality in the absence of discrimination.

Two other Circuits have considered this question and have come to the same conclusion. *Downs* v. *Board of Education of Kansas City,* 336 F.2d 988 (10th Cir., 1964), *cert. denied* 380 U.S. 914 (1965); *Bell* v. *School, City of Gary,* 324 F.2d 209 (7th Cir. 1963), *cert. denied* 377 U.S. 924 (1964). See also *Springfield School Comm.* v. *Barksdale,* 348 F.2d 261, 264 (1st Cir. 1965).

Appellants rely on several decisions which they contend establish the constitutional invalidity of imbalanced schools. However, it would seem that these cases do not go that far. In each of them there was an added element which transmuted mere separation into segregation, difference into discrimination. This is in accord with our holding that bare statistical imbalance alone is not forbidden. There must also be present a quantum of official discrimination in order to invoke the protection of the Fourteenth Amendment.

In *Taylor* v. *Board of Education of City School Dist. of New Rochelle,* 294 F.2d 36 (2nd Cir. 1961), *cert. denied*

368 U.S. 940 (1961), the Court of Appeals characterized as "crucial" the District Court's finding that the defendant School Board has deliberately created and maintained a segregated school, saying at page 39:

> "In short, race was made the basis for school districting, with the purpose and effect of producing a substantially segregated school."

This situation, where affirmative gerrymandering of school districts had been accomplished and maintained with the motive of separating the races, was found to go "beyond *mere* imbalance" (emphasis added). This latter language clearly indicates that the Court's theory was one of "imbalance plus". See also Kaplan, *Segregation, Litigation and the Schools: The New Rochelle Experience*, 58 Nw. U.L.Rev. 1 (1963).

Appellants place much emphasis on *Dowell* v. *School Board of Oklahoma City Public Schools*, 244 F.Supp. 971 (W.D. Okla. 1965), but we are unable to adapt that case to the problem of racial imbalance. Despite appellants' assertion that the District Court in *Dowell* dealt with facts similar to those in the case before us, it is clear that it did not. In that case the problem was one of initial desegregation of a school system which had previously been organized along the dual racial lines condemned by *Brown*. The Court was explicit in this respect:

> "This case does not raise issues regarding a school board's constitutional duty to correct racial imbalance in localities where there is no prior history of segregation, or where prior racial policies are deemed corrected." (pp. 980-981)

Further, it is clear that the duty of a school board in first imposing a neighborhood districting system where none was used before, is different from that where the system has been used for many years and the imbalance

in the schools is the result of population mobility among the various neighborhoods. In *Dowell,* the Court noted that the relative immobility of the Negro residents was used by the school board in separating them through the neighborhood policy, while in Cincinnati one of the primary causes of imbalance has been the rapid movement of the Negro population into different areas of the city. Thus, the problem in *Dowell* was far closer to the gerrymandering in *Taylor* than to anything in the classic statistical imbalance cases in northern cities.

Finally, in the one case in which a district Court apparently accepted the appellants' theory of racial imbalance, *Barksdale* v. *Springfield School Comm.*, 237 F.Supp. 543 (D. Mass. 1965), the First Circuit, in vacating the decision and dismissing the complaint without prejudice specifically rejected any such asserted constitutional right. *Springfield School Comm.* v. *Barksdale,* 348 F.2d 261, 264 (1st Cir. 1965).

Appellants' right to relief depends on a showing of more than mere statistical imbalance in the Cincinnati schools. They must also expose that added quantum of discriminatory state action which deprives them of their constitutional right to freedom of choice. If the school officials, through overt practice or by subterfuge, have treated students differently solely because of race, then they not only must cease doing so, but also must take affirmative action to remedy the condition which they have caused. Thus, even if the Negro students were distributed uniformly in the schools, if other forms of discrimination were used against them they would still be entitled to the aid of the law. When no discrimination is shown, racial imbalance alone is no warrant for relief.

DID THE BOARD OF EDUCATION INTENTIONALLY CAUSE RACIAL IMBALANCE IN THE CINCINNATI PUBLIC SCHOOLS, DEPRIVE NEGRO CHILDREN OF EQUAL EDUCATIONAL OPPORTUNITIES, AND DISCRIMINATE AGAINST NEGROES IN THE HIRING AND ASSIGNMENT OF TEACHERS?

In their "Statement of Questions Involved" appellants assert that they have sufficiently shown that the Board of Education has *intentionally* caused, and then failed to eliminate, serious racial imbalance in the Cincinnati public schools, has afforded Negro children who are confined to segregated schools, inferior educational programs and facilities, and has provided school faculties and personnel which reflect the racial patterns of students. They state that children who attend racially imbalanced schools suffer injury constituting a denial of equal educational opportunity.

The findings of fact of the District Court assume significance in our review of this phase of the case. Under Rule 52(a) the court was required to find the facts specially. The findings should be both "comprehensive and pertinent to the issues to provide a basis for decision." *Schilling* v. *Schwitzer-Cummins Co.*, 142 F.2d 82, 84 (D.C. Cir. 1944); *Shapiro* v. *Rubens*, 166 F.2d 659 (7th Cir. 1948). In meeting this standard, the District Courts are not required to prepare elaborate findings on every possible issue or contention raised at trial. However, there must be subsidiary findings to support the ultimate conclusions of the court. *Kelley* v. *Everglades Drainage District*, 319 U.S. 415, 420 (1943); *Dearborn Nat'l Cas. Co.* v. *Consumers Petroleum Co.*, 164 F.2d 332, 333 (7th Cir. 1947). See also *Townsend* v. *Benamente*, 339 F.2d 421 (9th Cir. 1964). But see *Gay Games, Inc.* v. *Smith*, 132 F.2d 930, 931 (7th Cir. 1943).

At the trial level this case confronted the District Court with an enormous amount of evidence in the form of

detailed maps, charts, statistical tables, sociological studies, and historical accounts, in addition to a substantial amount of oral testimony, expert and otherwise. To his credit, the District Judge succeeded to a great degree in expediting the trial through the extensive use of many stipulations and effective pre-trial procedures, which sharpened the issues. However, in his opinion he adopted as fair the following statement taken verbatim from the School Board's brief:

> "The Cincinnati Public School System includes a number of schools which are attended almost entirely by Negro pupils, a number of schools attended entirely by white pupils, and a number of schools attended by both Negro and white pupils in various percentages of each of the races; the racial composition of each school is simply a result of the racial composition of the neighborhoods which they serve."

Then, after discussing the issue of imbalance, he stated:

> "Their [appellants'] failure to produce evidence to establish a policy of segregation or gerrymandering on the part of defendants strongly suggests that such practices have not been engaged in. It is here found that plaintiffs have failed to establish a deprivation of rights under the law or under the Constitution of the United States by the requisite degree of proof . . ."

In dealing with the issue of discrimination in the context of a great metropolitan educational complex, these general findings do not present an adequate basis for review by this Court.

The District Court's finding on the racial composition of the schools in Cincinnati reveals that the schools are indeed racially imbalanced. In other words, the Negro student population is not spread uniformly among the indi-

vidual schools, mainly because of the operation of the neighborhood school policy in conjunction with the residential concentration of Negroes in some areas. As the District Court held, and we affirmed above, this fact by itself gives rise to no relief. However, the crucial fact to be found is whether the racial imbalance was intentionally caused by gerrymandering or by other alleged discriminatory practices on the part of the Board. On that point the District Judge said only that appellants had failed to produce evidence to establish gerrymandering or other discriminatory practice and that this failure strongly suggested that such practices did not exist. Such a general finding must be supported by subsidiary findings of fact. *Kelley* v. *Everglades Drainage District, supra.*

Appellants, through extensive use of discovery techniques, adduced vast quantities of information concerning matters such as alleged discrimination in school attendance zoning, transportation policies, teacher selection and assignment, comparative test results, and policies on transfers and overcrowding of students. Some of their contentions with respect thereto are answered by appellees on appeal here, but some are not. This is due partly to the truncated status of the case at the time of the District Court's decision on the motion to dismiss, and partly because the Court considered only appellants', and not the School Board's, evidence in ruling on the motion.

An example of such unanswered and unaccounted for situations is the districting of the Sawyer Junior High School where the enrollment is mostly Negro. The fact is that its boundaries exclude children who live across the street from it in a largely white neighborhood. The School Board in its brief offered no explanation for this situation or for the selection of the Sawyer site so close to the existing Withrow Junior High School.

We have stated above that a showing of impairment of a Negro student's capacity to learn, arising from his

school's racial imbalance, does not, standing alone, make out a case of constitutional deprivation. Evidence of such harm, however, may indeed be relevant to the issues of the case before us. Appellants offered expert evidence on this subject. The School Board offered no opposing expert testimony, no doubt because the Court granted the Board's motion to dismiss, made at the close of plaintiffs' proofs. Our review would be helped by a finding as to whether the District Judge considered plaintiffs' expert testimony of such revelance, weight or probative value as to make an issue calling for rebuttal proof by defendant.

No findings were made on these disputed issues. Without findings we are unable to determine whether discrimination existed with respect to specific schools and programs.

Other errors have been asserted which, in the light of our other holdings, we deem insubstantial.

The judgment of the District Court is affirmed on the issue of racial imbalance not intentionally caused by the Board, and the case is remanded for further findings on the issues of claimed discrimination in specific schools and programs and claimed harm to Negro students, allegedly caused by racially imbalanced schools, and for the taking of such additional relevant evidence as either party may offer. *Northcross* v. *Board of Education of Memphis*, 333 F.2d 661, 663-664 (6th Cir. 1964).